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United States District Court  
Eastern District of Washington  
Honorable Stanley A. Bastian

United States,

Plaintiff,

v.

Andrei Stephanovich Borgheriu,

Defendant.

No. 4:22-CR-6040-SAB

Response to Government's Trial  
Brief re: EIDL Repayment

February 10, 2025 – 9:30 a.m.  
Richland, WA — With Argument

1 **I. Introduction**

2 The government is mistaken that evidence related to Mr. Borgheriu's  
3 repayment of the EIDL is irrelevant. Mr. Borgheriu's repayment of the loan is relevant  
4 and admissible not as a defense to wire fraud, but instead as circumstantial evidence of  
5 intent. A limiting instruction will ensure that there is no misunderstanding about the  
6 proper consideration of evidence of repayment.

7 **II. Argument**

8 As an initial matter, defense does not dispute that intent to repay a sum of  
9 money is not a defense to wire fraud.<sup>1</sup> Defense counsel does not intend to make any  
10 argument that his intent to repay or actual repayment is a defense. That is not the basis  
11 for admitting this information as evidence. However, that repayment is not a defense  
12 does not necessitate a finding that evidence of Mr. Borgheriu's *actual* repayment or his  
13 intent to do so is irrelevant as the government argues. This issue is very similar to the  
14 victim negligence-materiality distinction that has previously been addressed in this  
15 case.<sup>2</sup> Indeed, relevant evidence is generally admissible, and the Rules hold that  
16 evidence is relevant if: "(a) it has any tendency to make a fact more or less probable  
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18 <sup>1</sup> See *U.S. v. Miller*, 953 U.S. 1095, 1103 (9th Cir. 2020).

19 <sup>2</sup> See ECF No. 64. The Court rule it would "not prohibit Defendant from offering evidence on the  
SBA's lending practices to dispute materiality so long as Defendant offers it for that purpose—to  
show that the relevant industry did not consider statements like Defendant's to be material—and  
does not offer it to prove or argue a victim-negligence defense." *Id.* at 11.

1 than it would be without the evidence; and (b) the fact is of consequence in  
2 determining the action.”<sup>3</sup>

3 Here, evidence of Mr. Borgheriu’s intent to repay at the time he made the loan  
4 and his actual repayment make it less probable that he had formed the specific intent to  
5 defraud the government, going directly to the heart of the issue at trial. If Mr.  
6 Borgheriu did not have the specific intent to defraud the government at the time he  
7 entered the agreement, he is not guilty of the offenses charged. Evidence of intent to  
8 repay and actual repayment speaks to whether that specific intent was formed. Indeed,  
9 this is bolstered by the SBA’s own perspective on repayment of EIDLs.

10 The SBA’s senior leadership has taken the position that “[c]ommon-sense  
11 dictates that a bad actor would not fraudulently obtain a loan, only to repay it with  
12 interest.”<sup>4</sup> To permit the government to argue at trial that repayment is irrelevant  
13 would allow the government to advance a theory that is at odds with the SBA’s own  
14 admissions as to EIDL fraud.

15 Further, evidence relating to Mr. Borgheriu’s intent to repay the loan at the time  
16 he applied is relevant as it goes to his state of mind and his good faith understanding of  
17 the contract terms *at the time he applied for the loan*. Again, the government must prove  
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19 <sup>3</sup> Fed. R. Evid. 401; *see also* Fed R. Evid. 402.

<sup>4</sup> Letter from Bailey DeVries, Acting “Associate Administrator for the SBA Office of Capital Access, to Hannibal “Mike” Ware, Inspector General (June 21, 2023) (attached as Exhibit 1).

1 that *at the time of the application* Mr. Borgheriu had developed a scheme to defraud the  
2 SBA—i.e., use the loan funds for an “improper” purpose.<sup>5</sup> Because evidence relating  
3 to his subjective understanding of loan terms, including the obligation and his intent to  
4 repay the loan, is relevant to his state of mind at the time of the application, this  
5 evidence must not be excluded.

6 Because defense counsel recognizes there is some room for confusion of the  
7 jury, counsel suggests the Court provide a limiting instruction about any repayment  
8 evidence that is presented to the jury. Specifically, the Court could instruct as follows:

9 You are about to hear evidence that Mr. Borgheriu has been making his  
10 repayments of the EIDL. I instruct you that this evidence is admitted only for  
11 the limited purpose of demonstrating Mr. Borgheriu’s subjective understanding  
12 of the terms of the EIDL and his good faith interpretation of its terms and the  
obligations they imposed on him and therefore, you must consider it only for  
that limited purpose and not for any other purpose.

13 I specifically instruct you that repayment of the loan is not a defense to wire  
14 fraud. That is, just because Mr. Borgheriu has made payments towards the loan,  
15 it does not mean he necessarily lacked the specific intent to defraud the SBA.  
That determination of whether Mr. Borgheriu had an intent to defraud is for you  
16 to make based on the totality of the evidence presented at trial.<sup>6</sup>

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18  
19 <sup>5</sup> See ECF No. 126 (Gov’t Amended Trial Brief) at 2 (arguing “[t]he evidence will show that at the  
time he applied for the loan, the Defendant intended to use the funds to purchase” the home.”).

<sup>6</sup> See 9th Cir. Model Jury Instruction 2.12, *and U.S. v. Miller*, 953 U.S. 1095, 1103 (9th Cir. 2020).

1 This instruction addresses the concerns raised by the government in its amended  
2 trial brief. It leaves no room for question by the jury—repayment is not a defense.  
3 However, it also would avoid prohibiting the defense from seeking admission of  
4 relevant evidence that speaks to Mr. Borgheriu’s understanding of the EIDL terms and  
5 his state of mind at the time of entry of the loan that is therefore directly on point as to  
6 whether he had formed the requisite specific intent to commit wire fraud.

7 As a final note, the cases cited by the government in support of exclusion do not  
8 require the exclusion of all evidence related to repayment.

9 In *Miller*, the Ninth Circuit was concerned with whether the proposed jury  
10 instructions for wire fraud were sufficient.<sup>7</sup> Miller argued that because he intended to  
11 repay the money, he lacked the intent to “deceive *and* cheat.”<sup>8</sup> The trial court gave the  
12 instructions the government requested over Miller’s objection and instructed the jury  
13 that an individual could be guilty of wire fraud if they “acted with the intent to ‘deceive  
14 or cheat.’”<sup>9</sup> The *Miller* court went on to explain that the trial court’s instructions  
15 misstated the law. Miller was in fact correct and that in order to be guilty of wire fraud  
16 “a defendant must intend to deceive *and* cheat.”<sup>10</sup> However, the Ninth Circuit ruled  
17 that this was harmless error because Miller’s defense—that he intended to repay the

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18 <sup>7</sup> *Miller*, 935 F.3d at 1101.

19 <sup>8</sup> *Id.* (emphasis in original).

<sup>9</sup> *Id.* (emphasis in original).

<sup>10</sup> *Id.* (emphasis in original).

1 money—was not a valid defense, regardless of the misstatement of the law.<sup>11</sup>

2 Instrumental to the holding there, then, was Millers proffered defense of intent to  
3 repay. There was no consideration as to whether intent to repay was admissible for  
4 alternative purposes.

5 In *Sarfo*, the order did not engage in any real analysis of the issue. It conclusory  
6 stated the holding in *Miller* that repayment is not a defense and summarily prohibited  
7 the defense from offering evidence of repayment.<sup>12</sup> There was no consideration of a  
8 limiting instruction and nothing beyond conclusory statements.<sup>13</sup> This Court should  
9 decline to merely adopt this conclusory reasoning. Instead, because defense intends to  
10 seek admission for a proper purpose (and not an unavailable justification defense), and  
11 because a limiting instruction will prevent juror misunderstanding, the government’s  
12 request should be denied.

### 13 III. Conclusion

14 The Court routinely handles dual-purpose evidence. For example, the  
15 government often relies on the proper purpose-propensity instruction in F.R.E. 404(b)  
16 cases. The Court has similarly been asked to instruct on the proper distinction between  
17 materiality and victim negligence in this very case.<sup>14</sup> Because evidence surrounding

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18 <sup>11</sup> *Id.* at 1102-03.

19 <sup>12</sup> See *U.S. v. Sarfo*, 2024 WL 4169277 at \*1 (D. Nev. Sept. 12, 2024).

<sup>13</sup> See *id.*

<sup>14</sup> See ECF No. 64.

1 Mr. Borgheriu's intent to repay the loan and his actual repayment of the EIDL is  
2 relevant to *mens rea*, the Court should not prohibit the evidence, but instead simply  
3 give the jury proper instructions.

4 Dated: February 4, 2025.

5 Federal Defenders of Eastern Washington & Idaho  
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7 s/ Nick Mirr

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11  
12 Service Certificate

13 I certify that on February 4, 2025, I electronically filed the foregoing with the  
14 Clerk of the Court using the CM/ECF System, which will notify Assistant United  
15 States Attorneys: Jeremy J. Kelley and Frieda K. Zimmerman.

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Response